

**Millard Refrigerated Services, Inc. and United Steelworkers of America, AFL-CIO-CLC.** Case 10-RC-14820

September 30, 1998

**DECISION, DIRECTION, AND ORDER**

BY MEMBERS FOX, LIEBMAN AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held August 1, 1997, and the hearing officer's report recommending disposition of them (attached as an appendix). The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 18 for and 14 against the Petitioner with 5 challenged ballots, a sufficient number to affect the results.<sup>1</sup>

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings<sup>2</sup> and recommendations only to the extent consistent with this Decision, Direction, and Order.

The hearing officer found that leadmen Jimmy W. McCoy and William Smith are supervisors within the meaning of Section 2(11) of the Act, and recommended that the challenges to their ballots be sustained. The Employer excepts, contending that McCoy and Smith do not have authority to exercise independent judgment in connection with their duties. For the reasons set forth below, we find merit in the Employer's exceptions.

The Employer operates a cold storage warehouse in Attala, Alabama where it stores food items, such as cheese, chicken, and french fries. These items must be kept refrigerated to preserve their freshness. Part of the facility abuts railroad tracks where rail cars are loaded and unloaded. The facility has over 30 truck docks for the receipt and shipment of products. Forklift operators unload the goods and transport them to the appropriate spaces within the facility, as directed by McCoy and Smith. Forklift operators send items to "blast cell" rooms, where they are frozen solid. The food is then moved by the forklift operators into regularly refrigerated rooms. The forklift operators also load the trucks and rail cars. Checkers count the food items loaded and unloaded and then check their calculations against the bills of lading. The employees perform the same tasks every day, although on different trucks and railroad cars.

McCoy and Smith assign and direct the work of the service employees, checkers, and forklift operators who work on the first shift. They assign employees to service the trucks and rail cars in the order that they arrive. Some of the Employer's major customers, however, have priority in being serviced, and it is common knowledge

that their trucks are to be serviced ahead of others. In the interest of keeping costs down, McCoy and Smith rotate certain employees between different jobs and crews, and send employees home when there is not enough work. When not overseeing the employees' work, McCoy and Smith spend a majority of their time completing paperwork. They do not attend supervisory meetings, are hourly paid, and occasionally perform checking and forklift operators' work.

McCoy and Smith once had authority to discipline service employees, but in December 1996 that authority was rescinded. Since then, McCoy has had no involvement in employee discipline, and Smith's involvement has been limited to one instance. In that instance, Smith submitted a written warning to the plant superintendent regarding an employee's tardiness. The plant superintendent thereafter signed the warning after independently reviewing the time records.

The hearing officer found that McCoy and Smith exercise independent judgment in assigning and directing the work of the service employees, and thus are 2(11) supervisors. He relied on the fact that McCoy and Smith instruct the service employees as to which trucks or trains they should unload, that they allocate manpower among various jobs, and that they have sent employees home. The hearing officer also found that McCoy and Smith are supervisors because they effectively recommend discipline. Contrary to the hearing officer, we find that neither the evidence concerning the assignment and direction of work, nor that concerning the recommendation of discipline, establishes supervisory status.

The Board, with court approval, has found that the assignment and direction of employees in connection with the loading and unloading of trucks, and in connection with the storing of goods, is generally routine in nature.<sup>3</sup> Here, the service work at the Respondent's facility consists of unloading food items from trucks and railroad cars, counting and storing the delivered goods, and loading the stored food items onto the outgoing trucks and railroad cars. The service employees all understand that the trucks are handled in the order they arrive at the facility, unless a particular truck has priority, and it is common knowledge among the employees as to which trucks have priority. Further, the record indicates that individual service employees perform the same job tasks on a continuous basis.

In these circumstances, we find that the record fails to establish that McCoy and Smith's assignment of work constitutes responsible direction within the meaning of Section 2(11) of the Act. The service employees' work is repetitive and requires little supervision, and thus

<sup>1</sup> At the hearing, the Union withdrew its challenge to the ballot cast by Jeff L. Billingsley.

<sup>2</sup> In the absence of exceptions, we adopt pro forma, the hearing officer's recommendation that the challenges to the ballots of James R. Ragan and Kermit E. Richey should be overruled.

<sup>3</sup> *Piggly Wiggly*, 280 NLRB 1160, 1166-1169 (1986), enf'd. 827 F.2d 1098 (6th Cir. 1987); *Sears, Roebuck & Co.*, 292 NLRB 753 (1989); *Highland Superstores, Inc.*, 927 F.2d 918 (6th Cir. 1991), enf'g. 297 NLRB 155 (1989).

McCoy and Smith's assignments are routine in nature.<sup>4</sup> That McCoy and Smith assign service employees to various tasks, and that they may rotate them between different jobs and crews, does not, by itself, reflect their ability to responsibly direct employees. McCoy and Smith are experienced employees who know which of their fellow employees have the greater skill and experience. Their use of this information when assigning service work does not establish that they exercise independent judgment.<sup>5</sup>

Nor does the fact that McCoy and Smith send service employees home early confer supervisory status. According to the standards set by the plant manager and superintendent, the leadmen may send employees home only when it is clear that their services are not needed for the remainder of the day. Thus, the decision to send employees home is based solely on the observation that there is no other work to be done, and does not involve the use of independent judgment.<sup>6</sup>

Accordingly, in relation to McCoy and Smith's role in assigning and directing service employees' work, including the decision to send employees home early, we find that in each instance the authority exercised does not involve independent judgment, but rather constitutes routine decisions typical of leadmen and other employees that are typically found by the Board not to be supervisors.<sup>7</sup>

We also do not agree with the hearing officer that McCoy and Smith have the authority to effectively recommend discipline. As noted above, in December 1996, the Respondent rescinded their authority to discipline service employees. This rescission notwithstanding, the hearing officer relies on a subsequent incident involving Smith's submission of a written disciplinary form to plant superintendent Joe Webb, citing service employee Scott Holmes for tardiness. As noted above, Webb, not Smith, signed the disciplinary form only after reviewing the time records. We find that this action fails to show that this was anything more than a reportorial function or that Smith exercised independent judgment in submitting the form to Webb. Indeed, Webb engaged in an independent investigation, by checking the time records, before he signed the written disciplinary form. Thus, the record does not support the hearing officer's finding that the leadmen have the authority to effectively recommend discipline requiring the use of independent judgment.

<sup>4</sup> See, e.g., *House of Mosaics*, 215 NLRB 704, 710 (1974).

<sup>5</sup> See *Sears, Roebuck & Co.*, supra at 755.

<sup>6</sup> In finding that the authority to send employees home early involves independent judgment, our dissenting colleague relies on the hearing officer's description of the "factors" taken into account when deciding to send employees home. This description, however, amounts to nothing more than checking to see whether there is any other work to be done. In our view, this does not demonstrate the use of independent judgment.

<sup>7</sup> *Byers Engineering Corp.*, 324 NLRB 743 (1997).

In sum, the factors relied upon by the hearing officer, considered separately and cumulatively, are insufficient to establish that McCoy and Smith possessed any of the indicia of supervisory status enumerated in Section 2(11) of the Act. Accordingly, we shall overrule the challenge to the ballots of Smith and McCoy and shall direct that their ballots be opened and counted.

#### DIRECTION

IT IS DIRECTED that the Regional Director for Region 10 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Jeff L. Billingsley, James R. Ragan, Kermit E. Richey, Jimmy W. McCoy, and William Smith, and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

#### ORDER

It is ordered that this matter be remanded to the Regional Director for Region 10 for further processing consistent with this decision.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I agree with the hearing officer that challenged voters Jimmy W. McCoy and William J. Smith are 2(11) supervisors and are thus ineligible to vote in the election. Accordingly, I would sustain the challenges to their ballots and certify the Union as the exclusive bargaining representative.<sup>1</sup>

The hearing officer found, and I agree, that leadmen McCoy and Smith<sup>2</sup> are supervisors based on their authority to assign and to responsibly direct the work of approximately 18 first-shift service employees, checkers, and fork lift operators. Even if the work of these employees can be characterized as repetitive and routine, this does not mean that the assignment and direction of that work is repetitive and routine. As discussed below, that assignment and direction involve independent judgment.

The Employer has established "cost per hundred weight" standards for its cold-storage operation. These corporate standards prescribe the total labor costs that can be expended on the product handled by the Employer within a particular time frame. McCoy and Smith are responsible for tabulating the "cost per hundred weight" calculations for their respective day-shift crews. As found by the hearing officer, McCoy and Smith are required to keep their crews' cost within these cost limits. They do so through their assignment, reassignment, and direction of day-shift personnel. As noted by the hearing officer, McCoy and Smith have no control over the

<sup>1</sup> The election results were 18-14, in favor of the Union. There were five challenges. One was withdrawn and two were overruled by the hearing officer. There are no exceptions to the overrulings, and the Board adopts them pro-forma.

<sup>2</sup> McCoy and Smith were termed "supervisors" until shortly before the election when the Employer renamed them "leadmen."

weight of goods handled by the day shift. However, in order to make sure that the weight is handled within acceptable costs, McCoy and Smith must make independent judgments as to how many employees, and which ones, are to be assigned to a particular task.

Further, although the Employer's general practice is to provide "first-in, first-out" service to customers, McCoy and Smith may deviate from this procedure in several circumstances. For example, they alter assignments as needed to provide preferential service to favored customers, to take into account relative employee skills and aptitudes as judged by McCoy and Smith, to divert product that requires quick "blast" freezing, and to deal with the varying quantities of product handled by the facility. Further, to contain costs when facing these or other exigencies, McCoy and Smith substitute or rotate employees, trade employees between their respective crews, hasten employees in their work, reassign employees in order to improve efficiency, extend employees' regular hours as needed, approve requests for excused absences, deny requests for time off, and send employees home to curtail costs.<sup>3</sup> These actions, in my view, clearly constitute assignment and responsible direction of work, using independent judgment.

I also agree with the hearing officer that McCoy and Smith have an additional indicium of supervisory status based on their authority to effectively recommend discipline. Prior to December 1996, these leadmen had authority to discipline employees on their own. As found by the hearing officer, the only change to this authority in December 1996 was that Smith and McCoy could no longer decide for themselves whether to discipline employees. They could, however, effectively recommend employee discipline. Further, Smith exercised this authority by subsequently writing up employee Holmes for tardiness, which recommendation Plant Superintendent Webb approved.<sup>4</sup> As found by the hearing officer (fn.6),

<sup>3</sup> The majority oversimplifies the authority of McCoy and Smith to send employees home early, stating that this is done only "when it is clear that their services are not needed for the remainder of the day." As found by the hearing officer:

The decision to send employees home is made by taking account of such factors as: whether all the trucks and rail cars have been unloaded; how much additional freight is expected to arrive; the expected arrival times of additional freight; whether any expected freight can be unloaded with regular forklifts or only by use of the slip sheet machine; whether there is work other than unloading, such as cleaning the dock areas to occupy waiting for expected deliveries; and, finally, whether the services of workers whose services are no longer needed in their usual work areas that day are in demand on another dock.

And, significantly, all of these factors must be considered in light of the labor costs per hundred weight. In this regard, McCoy and Smith must balance the respective costs of retaining an employee at work versus sending him home early.

<sup>4</sup> The majority notes that, prior to signing the disciplinary form that McCoy prepared, Webb may have checked the numbers on Holmes' tardiness. However, the fact that the decision-maker checks a fact

these write-ups can, and do, affect terms and conditions of employment.

In sum, for these reasons, as well as those relied on by the hearing officer, I find that McCoy and Smith are statutory supervisors. Accordingly, I would sustain the challenge to their ballots.

## APPENDIX

### HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS

The petition in the above-captioned proceeding was filed on June 17, 1997. Pursuant to a Stipulated Election Agreement approved on July 7, 1997, an election by secret ballot was conducted on August 1, 1997, among the employees in the unit stipulated to be appropriate to determine the question concerning representation.<sup>1</sup> Upon conclusion of the balloting, the parties were furnished a tally of ballots, which showed that of approximately 37 eligible voters, 18 cast valid votes for and 14 cast valid votes against the Petitioner. There were five challenged ballots and no void ballots. The challenged ballots were sufficient in number to affect the results of the election. No objections to the conduct of the election were filed.

Thereafter, on October 29, 1997, the Regional Director issued a Report on Challenged Ballots, Order Directing Hearing, and Notice of Hearing. A hearing was conducted by Hearing Officer John D. Doyle Jr. on November 5 and 6, 1997, in Birmingham, Alabama. Both parties were represented at the hearing and were allowed full opportunity to participate, to examine, and to cross-examine witnesses and to introduce evidence.

I have considered the entire record in this case carefully. The findings of fact and credibility resolutions contained herein are based on my observations of the testimony and demeanor of the witnesses.<sup>2</sup>

Upon the entire record, I make the following findings of fact, credibility resolutions, and recommendations.<sup>3</sup>

#### BACKGROUND FACTS

The Employer operates a 198,000-square-foot cold storage warehouse in Attala, Alabama. (Transcript, hereinafter "Tr.," 283-284.) The facility has two types of docks, to accommodate both rail cars and trucks. The employees unload food items, such as cheese, chicken, and french fries transported to

before making a decision does not render the recommendation ineffective.

Further, I do not find it significant that this authority has been exercised infrequently. Sec. 2(11) covers not only action, but the authority to take action.

<sup>1</sup> The stipulated appropriate unit is: All service and maintenance employees, including custodians, employed by the Employer at its Attalla, Alabama facility, but excluding all other employees, office clericals, guards, and supervisors as defined in the Act.

<sup>2</sup> I have made determinations of credibility based upon general demeanor, partisan interests, guarded or evasive answers, replies to leading questions under direct examination, memory for detail, the ability to comprehend questions and their answers, self-serving answers, and conclusional testimony. When deemed necessary, I shall note my specific findings and the reasons therefor. Testimony judged patently incredible or unworthy of belief may not be discussed or subjected to comment. Accordingly, any failure to detail all conflicts in evidence does not mean that such conflicting evidence was not considered.

<sup>3</sup> Both the Employer and the Union filed posthearing briefs, which have been duly considered.

the facility by trucks and rail cars. (Tr. 545.) The food items must be kept refrigerated to preserve freshness. The service employees in the bargaining unit fall within two general categories: checkers and forklift operators. The bargaining unit also includes maintenance employees and custodians. The checkers count the food items delivered and their calculations are then checked against the bills of lading. The operators unload the goods and transport them by forklift to the appropriate space within the facility. The facility also has "blast cell" rooms, where not fully frozen food items are exposed to exceptionally cold "blasts" of air which freeze them solid. (Tr. 463-464.) The forklift operators move the goods from the blast cooling rooms into regular refrigerated storage space elsewhere in the warehouse once they are frozen solid. (Tr. 463-464.)

Where parts of a shipment are damaged, the Employer takes pictures and ascertains the customers' desires as to disposition of the damaged articles. Where there is only minimal damage, the Employer does not take pictures. The warehousing operation runs continuously, but there are two primary shifts for work crews. The first shift operates from approximately 7 a.m. to 4 p.m., and the general hours of the second shift are 4 p.m. to 12 midnight. The warehouse receives shipments during both shifts, but outgoing goods are shipped primarily during the first shift.

The Employer employs three maintenance personnel who are responsible for servicing and repairing the ammonia system which cools the warehouse. The maintenance employees also repair problems with tools and equipment as necessary pursuant to work order forms assigned them. The maintenance employees report to the Plant Engineer, an individual whom the parties agree is a Supervisor within the meaning of Section 2(11) of the Act. There are two custodial employees, who report to Office Manager Michelle McCoy.

The four office employees keep records, file paperwork, and answer telephones. The office employees also report to Office Manager McCoy, whom the parties agree is a supervisor within the meaning of Section 2(11) of the Act. The office clerical employees are excluded from the bargaining unit pursuant to the stipulated election agreement.

Plant Manager Charles Margraf is responsible for the overall operations of the facility, including hiring, disciplining employees, responding to customer concerns, generating business, and meeting the corporately prescribed cost-per-hundred weight goal. (Tr. 283, 322, 323, 348-349.) The cost-per-hundred weight is calculated by dividing the total labor expenditures by the weight of the cargo shipped and received at the facility for the pertinent time frame. (Tr. 320.) Margraf's usual hours are about 7 a.m. to 5 p.m. (Tr. 324.) Plant Superintendent Joe Webb assists Margraf with his duties. Webb also works day-shift hours. Webb administers discipline, responds to customer complaints, and reviews bills of lading and employees' tabulations of the quantities of goods received and shipped. The parties agree that both Margraf and Webb are supervisors within the meaning of Section 2(11) of the Act.

Bill Jenkins has occupied the position of night-shift Superintendent since he came to work for the Employer in October 1996. He works from approximately 4 p.m. to 1 a.m. (Tr. 562.) Jenkins is responsible for the hiring on his shift, he disciplines employees, computes the estimated cost-per-hundred-weight ratio for his shift, and checks the accuracy of employees' tabulations of quantities received. (Tr. 534, 549.) The parties agree

that Jenkins is a supervisor within the meaning of Section 2(11) of the Act.

#### THE CHALLENGED BALLOTS

At hearing, the Union requested and was granted permission to withdraw the challenge it had made to the ballot cast by Jeff L. Billingsley. (Tr. 8-9.) The Union and the Employer stipulated that Jeff L. Billingsley was eligible to vote in the election, and that, in the event the Board concludes that his ballot is determinative, that ballot should be opened and counted. (Tr. 9.) The validity of the Union's challenges to the ballots cast by Jimmy W. McCoy, William J. Smith, James R. Ragan, and Kermit E. Richey are the only issues before the Hearing Officer. The Union takes the position that the four individuals are supervisors within the meaning of Section 2(11) of the Act. The Employer takes the contrary position. The challenges should be sustained if the individuals are supervisors within the meaning of Section 2(11) of the Act. Otherwise, the challenges must be overruled, and the challenged ballots opened and counted.<sup>4</sup>

The burden of establishing the supervisory status of these individuals rests with the Union as the party contending that the individuals are not employees within the meaning of the Act. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 (1989). The Board has a duty not to construe the term supervisor too broadly, because employees who are deemed supervisors are denied important rights that the Act was intended to protect. *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989). The statute lists supervisory duties in the disjunctive, so an individual need have authority only with regard to any one listed supervisory function in order to be within the statutory definition. *Id.* at 489. In order to establish supervisory status, however, the exercise of authority must be made in conjunction with the use of independent judgment in the Employer's interest. *Id.*

The Employer's admitted supervisory hierarchy consists of Plant Manager Charles Margraf, Plant Superintendent Joe Webb, Night Shift Superintendent Bill Jenkins, the Plant Engineer position, which was held by William Corneliuson at the time of the election, and Office Manager Michelle McCoy. Jimmy W. McCoy and William J. Smith work on the day shift in positions which the Employer now calls "leadmen." James R. Ragan and Kermit E. Richey work on the evening shift in positions the Employer now calls "leadmen." As is stated above, the Union contends that these four individuals are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that the individuals have never been supervisors within the meaning of Section 2(11) of the Act. Additionally, the Employer contends that, even if the individuals did possess supervisory authorities in the past, changes in operations which took place in October 1996, and December 1996 stripped the individuals of any supervisory authority they possessed. Thus, there are two subissues before the hearing officer: (1) Were the individuals' supervisors within the meaning of Section 2(11) of the Act as late as October 1996? and (2) If so, did the Employer's asserted change in operations alter the

<sup>4</sup> Initially, the Union took an alternative position that the individuals were office clerical employees. Near the close of hearing, the Union withdrew its contention that the individuals were office clerical employees, and stated that its only grounds for challenging the ballots is 2(11) supervisory status. (Tr. 648.)

individuals' supervisory status?<sup>5</sup> This Report will address these issues below, *seriatim*.

I. THE INDIVIDUALS OCCUPYING THE DISPUTED JOB CLASSIFICATIONS WERE SUPERVISORS WITHIN THE MEANING OF SECTION 2(11) OF THE ACT PRIOR TO THE CHANGES IN OPERATION WHICH BEGAN IN OCTOBER 1996

A. *The Possession of Statutorily Defined Supervisory Authority*

Although the Employer contends to the contrary, I think there is little doubt that the individuals possessed 2(11) supervisory authorities prior to October 1996. The Employer introduced an Exhibit 23, through its own witness Joe Webb, which demonstrates that individuals in the disputed job classification issued almost 50 percent of the disciplines undertaken at the facility over the course of the time period 1993 through 1997. (Employer Exhibit, hereinafter "Exh.," 23.) The document demonstrates that individuals in the "leadman" category issued 30 disciplines, including 17 verbal warnings, 11 written warnings, and 2 suspensions during that time period. (Emp. Exh. 23.) The evidence disclosed that the individuals signed the disciplinary forms and other company paperwork as "supervisors." (U. Exhs. 1, 5, 6, 7, 9, 11, 13, 14, 15, 16, 17, 18, 20, 21.) Employer Exhibit 23 demonstrates that individuals employed in the disputed classification issued 30 of the 63 total disciplines issued during the pertinent time frame, including 2 of the 8 suspensions.<sup>6</sup> (Emp. Exh. 23.)

<sup>5</sup> I deem it necessary in resolving the issue presented to consider first the supervisory status of the individuals at the time preceding the operational changes and then to proceed to the question of whether the individuals were supervisors at the time of the election. To base a conclusion regarding supervisory status on the actions and authorities the individuals possessed before the asserted operational changes alone without considering the effect of the asserted changes on the supervisory status issue would be to ignore the possible scenario, as urged by the Employer, that the individuals were stripped of some of their duties and authorities through changes that took place in October 1996 and December 1996. By contrast, to consider the supervisory status question based only on the occurrences between December 1996 and the August 1, 1997 election would provide a disturbingly possessed before the asserted operational changes alone without considering the effect of the asserted changes on the supervisory status issue would be to ignore the possible scenario, as urged by the Employer, that the individuals were stripped of some of their duties and authorities through changes that took place in October 1996 and December 1996. By contrast, to consider the supervisory status question based only on the occurrences between December 1996 and the August 1, 1997 election, would provide a disturbingly short time period sample, where the Employer's operations during some of that time period were possibly influenced (as asserted by the Union) by a desire to affect the composition of the bargaining unit in the event of an election. The evidence established that the Union organizing drive was underway at the time the Employer assertedly implemented the second series of operational changes in December 1996.

<sup>6</sup> The Employer correctly argued that an individual's authority to issue verbal and written reprimands does not, in itself, confer supervisory status absent a showing of some effect on the employment relationship. E.g., *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *S.D.I. Operating Partners*, 321 NLRB 111, 112 (1996). In the instant case though, the evidence demonstrated that the individuals had the authority to suspend employees, and individuals in the disputed category issued two of the eight suspensions at the facility during the time period 1993 through 1997. Moreover, Plant Superintendent Joe Webb testified that the Employer follows a progressive disciplinary system, such that repeated commissions of the same offense result in progressively sterner disciplinary measures. (Tr. 581.) In one case, the progressive discipli-

Although the Employer claims that the individuals are "leadmen" I conclude that no Employer representative referred to the individuals as "leadman" prior to October 1996.<sup>7</sup> Thus, each individual signed disciplines as "supervisor;" they signed work orders as "supervisor;" and the Plant Superintendent Joe Webb introduced McCoy and Smith to employees as the "supervisors." (Tr. 16, 60.) Webb told employees that if they had problems to go to their supervisors, and he motioned to McCoy and Smith. (Tr. 77.) Webb told employees that the chain of command was for them to take problems to Supervisors Jimmy McCoy and Billy Smith first, who would take the problems up the chain of command if necessary. (Tr. 611.) Although the Employer's use of the term "supervisor" is not controlling on the issue of supervisory status within the meaning of Section 2(11) of the Act, e.g., *Chevron U.S.A.*, 301 NLRB 59, 61 (1992), the Employer's consistent use of this terminology, and Webb's statements directing employees to go to supervisors McCoy and Smith with their problems demonstrates that the Employer held the individuals out to employees as supervisors.

Additionally, the evidence established that prior to October 1996, all employees in the disputed job classifications completed cost per hundred weight calculations for the employees in their crew. (Tr. 388, 435.) Plant Superintendent Joe Webb testified that he "got on" McCoy and Smith "pretty heavy" about the need for them to come in with acceptable cost per hundred weight figures. (Tr. 591, 611.) Webb's statement that he "got on" McCoy and Smith about the figure was corroborated by the testimony of witness Bryan Abney, who occasionally fills in for Jimmy McCoy. Abney testified that one will "hear about it" if the figure is unacceptable. (Tr. 112.) Abney explained that on occasions where he substituted in McCoy's absence, it was his duty to rotate employees, and move employees around to control costs. (Tr. 122-123, 148.) Further, witness Randy Jenkins testified that Billy Smith said it was his responsibility to run at a 12-cent ratio. (Tr. 270.) Jenkins testified that Billy Smith said he got chewed out by management if he failed to contain costs. (Tr. 270.) I credit Jenkins' testimony in this regard. Even though Jenkins apparently misunderstood the means by which supervisors calculated the ratio, he was certain that Billy Smith had made the statement about getting chewed out if costs ran too high. (Tr. 270.) Thus, Randy Jenkins' testimony regarding Billy Smith's statements corroborated Webb's testimony that he had gotten on the lead men pretty heavy when the ratio did not meet expectations. (Tr. 591.)

The evidence is undisputed that McCoy and Smith assign work to the checkers and forklift operators, and direct those employees in their work. (Tr. 297-298, 368, 458, 627.) How-

nary system has resulted in discharge for repeated tardiness. (Tr. 639.) Thus, even verbal and written warnings have a definite effect on the employment relationship in this case.

<sup>7</sup> Kermit Richey testified that on occasion truckdrivers from outside companies had asked to speak with a leadman and employees had directed them to Richey. (Tr. 429.) However, Richey's response to the question posed by union counsel demonstrates that leadman was not a part of the plant's internal vocabulary prior to October 1996. (Tr. 429.) Brian Abney testified that the Employer only started using the term "leadman" around the time of the election. (Tr. 129, 142.) Roger Leath testified that the Employer called. Smith and McCoy supervisors at the safety meeting in February or March 1997, and only started using the term "leadman" subsequent to that. (Tr. 77, 81.) I credit Abney's and Leath's testimony regarding when the Employer began using the term "leadman."

ever, the Employer contends that McCoy's and Smith's assignment and direction of work did not involve the exercise of independent judgment in the interest of the Employer. Where individuals assign and direct work in a routine manner, the Board will conclude that such assignment and or direction is not done through the exercise of independent judgment. E.g., *Somerset Welding & Steel*, 291 NLRB 913, 914 (1988). The Employer's witnesses uniformly used the adjective "routine" in describing the disputed individuals' assignment and direction of work. (Tr. 290, 307, 325, 345, 356, 458, 534, 535, 536, 543, 566.)<sup>8</sup> However, the evidence concerning what the individuals actually do in assigning and directing work, has convinced me that such assignment and direction is not at all routine.

During the day shift for example, Jimmy McCoy and Billy Smith each assign unloading duties to members of their crews. There is a rail car crew, and crews that unload trucks. The Employer follows a general practice of "first in first out" in that whichever truck or rail car arrives first will be the first to be unloaded, and whichever truck or rail car arrives second will be next, etc. However, there are a number of exceptions to this general rule. Some customers have a preferred arrangement with the Employer, such that the Employer will sometimes skip over other trucks or rail cars, even though they may have arrived sooner, and unload the truck or rail car of the preferred customer out of turn. Further, there is the matter of the blast freezers.

As mentioned above, some customers bring less than frozen goods to the facility, in which case, the Employer subjects those goods to cold blasts until they freeze, at which point the Employer then moves the goods to the regular storage space of the warehouse which is also refrigerated, but is not as cold as the cold blast areas. (Tr. 463.) The testimony established that truckers sometimes bring in goods that need to be exposed to the cold blasts at a time when the Employer's limited number of cold blast areas are occupied by other goods still in the process of freezing. (Tr. 463, 628.) In those instances, the new goods have to wait until a cold blast area becomes available. (Tr. 628.) This is another instance where the person in charge of assigning the unloading of trucks must decide which truck to do next and which employees to assign to it. (Tr. 628.)

Only two operators on Jimmy McCoy's crew, Mike Elrod, and Brian Abney, know how to operate the slipsheet machine. (Tr. 140.) Some of the freight which the warehouse employees unload can be unloaded only through use of the slip sheet machine. Thus, the person in charge of assignments must decide, when a truck arrives carrying goods that can be unloaded only through use of a slipsheet machine: "Do I pull the slip sheet operator off of his current assignment on a truck which can be unloaded by an ordinary forklift, in order to put him on assignment to the truck which can be unloaded only by use of a slip sheet?" The decision's difficulty level is compounded if there are other trucks to be unloaded, or if some of the other trucks are those of preferred customers with special arrangements, or if one of the trucks waiting has goods which must be exposed to cold blasting, and what if no cold blasting areas are vacant right then, and when will the next opening be? Along with this, the person making the assignments will need to have someone

move the goods in the cold blast area to the regular warehouse space in order to free up the cold blast area to receive the goods on the truck, and to keep the unloading process moving. Further, the supervisors are responsible for deciding where in the warehouse unloaded goods should be placed. (Tr. 627.)

I am convinced that those who make the assignments for truck and rail unloading do not perform a "routine" function. The testimony of Brian Abney, who filled in for Jimmy McCoy on numerous occasions during 1997, demonstrated that the Employer relied even on McCoy's substitute to rotate employees, move employees around, and send employees home early in order to contain the cost levels. (Tr. 111, 123-124, 148.) This kind of assignment and direction of work, driven by the omnipresent burden of McCoy and Smith to meet the corporately prescribed cost per hundred weight ratio, is the kind of assignment and direction of which Section 2(11) of the Act speaks.

In *Ten Broeck Commons*, 320 NLRB 806, 810-811 (1996), the Board concluded that Licensed Practical Nurses at a nursing home were not supervisors within the meaning of Section 2(11) of the Act even though they assigned and directed the work of the Certified Nursing Assistants at the facility. The Board based this determination on its conclusion that the LPNs' assignment and direction of work was merely routine, and did not involve the exercise of independent judgment in the interest of the employer. The instant case is in sharp contrast to the facts which were before the Board in *Ten Broeck Commons*. Whereas the CNAs in *Ten Broeck Commons* possessed identical certifications and essentially identical skills, the bargaining unit employees of the Employer possess varying levels of skills and aptitudes with the different machines. As discussed above, Jimmy McCoy will, on occasion, assign slipsheet operators Brian Abney and Mike Elrod to other jobs, and then McCoy must make an assignment decision if a need arises for use of the slipsheet machine somewhere else. Whereas the primary factor in the LPNs' care plan for residents in *Ten Broeck Commons* was the LPNs' professional judgment, the Employer's supervisors herein are driven only by the Employer's directive to bring labor costs within the acceptable ambit that will generate a satisfactory cost per hundred weight ratio. The Employer here delegated to its supervisors, particularly those on first shift, the authority to direct and assign employees, including rotating employees between different jobs and different crews, sending employees home, approving requests for excused absences, and denying employees' requests for time off, for the express purpose of the supervisors thereby controlling costs. (Tr. 29, 122-123, 148, 270, 485-486, 517-518, 591, 611; U. Exhs. 14, 17.)

The dock supervisors, as Plant Superintendent Joe Webb referred to McCoy and Smith exclusively before October 1996, had an ever changing number of factors to consider in making assignments. They pulled employees off some jobs and assigned them to others, and McCoy and Smith "traded" employees between their two crews. There are approximately 18 checkers and operators on the first shift, and McCoy's and Smith's management of that workforce was the sole means by which they could control the cost per hundred weight ratio which Plant Superintendent Joe Webb required them to keep under control. In brief, the Employer cited *Byers Engineering Corp.*, 324 NLRB 743 (1997), for the proposition that an individual's reassignments of work designed to equalize employees' work does not confer supervisory status. In this case,

<sup>8</sup> I accord no weight to the Employer's witnesses persistent use of the word "routine" while testifying. As is set forth more fully in this Report, the evidence I credit demonstrates that the work which the individuals assign and direct is not routine, and the Employer's ability to clutter the record with the word "routine" is of no help to it.

however, it was the individuals' duty to assign work, not for the purpose of equalizing work, but to contain costs and drive down the cost per hundred weight ratio. (Tr. 111.) This assignment and direction was not routine; it was done in the exercise of independent judgment in the interest of the Employer.

The weight of goods handled each day is not a factor over which the supervisors have any control. That is, however many tons of freight are coming each day are coming and there is nothing the supervisors can do to change that number. The only factor in the cost-per-hundred-weight formula that the supervisors can effect is the number of hours worked by employees on their crews. The supervisors can manage these numbers by assigning work to employees in the most efficient way; by hurrying employees to do it faster, through such means as discipline for unsatisfactory job performance, and by sending employees home early. The Plant Superintendent "gets on" the supervisors if they do not control the cost-per-hundred-weight figure.

The assignment decision which most directly affects the cost per hundred weight ratio is the decision of when to send employees home. Although employees have scheduled work hours, they work more or less than the scheduled hours if individuals in the disputed classifications believe the circumstances warrant sending them home. (Tr. 485-486.) The decision to send employees home is made by taking account of such factors as: whether all the trucks and rail cars have been unloaded; how much additional freight is expected to arrive; the expected arrival times of additional freight; whether any expected freight can be unloaded with regular forklifts or only by use of the slip sheet machine; whether there is work other than unloading, such as cleaning the dock areas to occupy employees waiting for expected deliveries; and finally, whether the services of workers whose services are no longer needed in their usual work area that day are in demand on the other dock.

I credit the evidence which established that the supervisors, Jimmy McCoy and Billy Smith, and their predecessors in the positions before them, made the decisions about whom to send home and when, at all times prior to October 1996. (E.g., Tr. 485-486.) I am convinced that these decisions were not routine, based on the litany of interrelated factors cited above which the supervisors would have to consider before deciding and due to the fact that the assignment and direction was accompanied by an obligation placed on the supervisors by management to insure that the labor costs were contained. (Tr. 591, 611 629-630.) The decision to send employees home is the only factor in the cost per hundred weight analysis over which the supervisors had direct control.

As the bargaining unit employees are hourly paid, the supervisors' decisions about when to send them home will affect the Employer's cost. The decision has a similar effect on the financial well-being of employees because a decision to send them home early means they make less money. Thus, the supervisors exercised independent judgment in making work assignments and directing employees' work. By assigning employees to tasks they can perform more efficiently and by getting employees out the door faster, the supervisors' independent judgement clearly is exercised in the interest of the Employer to control costs. (Tr. 517-518.) During the time period preceding October 1996, the Employer relied on the supervisors to make assignments, change assignments, swap employees between crews, and send employees home early toward the goal of lowering the cost-per-hundred-weight ratio.

The testimony was most detailed concerning the cost per hundred weight calculations Smith and McCoy made. The testimony of Bill Jenkins and Kermit Richey, which I credit, demonstrated that, prior to October 1996, the night shift supervisors also made cost-per-hundred-weight calculations and were relied on to keep those numbers in line by disciplining employees with poor performance and by making efficient work assignments that would allow some employees to go home earlier than scheduled.

Where an employer places on individuals the obligation to control labor costs by their direction and assignment of work, it clothes these individuals with the robes of supervisory authority defined in Section 2(11) of the Act.

The credited evidence firmly establishes that prior to October 1996, Supervisors Jimmy McCoy, Billy Smith, Kermit Richey, and James Ragan had authority to discipline employees on the Employer's behalf, through the use of independent judgment. Further the credited evidence establishes that, prior to October 1996, Supervisors Jimmy McCoy, Billy Smith, Kermit Richey, and James Ragan assigned and directed employees in their work through the use of independent judgment in the interest of the Employer, and for the purpose of controlling labor costs. Thus, all four individuals whose ballots the Union challenged were supervisors within the meaning of Section 2(11) of the Act prior to October 1996.

*B. Secondary Indicia also Support a Conclusion of Supervisory Status*

Additionally, some of the secondary indicia of supervisory authority support the conclusion that the individuals were supervisors. For example, the employee to supervisor ratio in the undisputed job classifications accords with a conclusion that the disputed positions are supervisory. Plant Engineer John Corneliuson supervised only three individuals. Office Manager Michelle McCoy supervised only six employees. If Jimmy McCoy, Billy Smith, Kermit Richey, and James Ragan were considered nonsupervisory employees, this would mean that Plant Superintendent Joe Webb was the immediate supervisor for approximately 18 employees, and that the night-shift superintendent was the immediate supervisor for approximately 10 employees. These numbers are in discord with the supervisor to employee ratio in the other facets of the Employer's operation at the facility. The maintenance department supervisor to employee ratio is only 1:3 and the office department supervisor to employee ratio is only 1:6.

Although the Employer contended that Plant Manager Charles Margraf should also be considered a supervisor for the employees on first shift, Margraf's duties encompass affairs much more broad sweeping than supervision of warehouse employees. Thus, Margraf is responsible for customer contact, initiating new business, and responding to the concerns of the corporate office. Margraf is the highest ranking official at the facility, and his responsibilities include the entire facility, that is: warehouse, office, and maintenance. Margraf does walk the warehouse floor daily and therefore observes the dock employees as they work, but the evidence demonstrated that Margraf did not administer any of the disciplinary actions listed on Employer's Exhibit 23 and Margraf does not involve himself with assignment or direction of work. Margraf is a high level manager, not a first-line supervisor.

The Employer's use of the term "supervisor" in referring to individuals in the disputed classification prior to October 1996

is indicative that the Employer viewed the individuals as having authority historically and statutorily supervisory in nature. The Employer represented to employees that the individuals were supervisors. Although the nomenclature is not dispositive, the use of the term supervisor as opposed to "leadman" which the Employer has used only of late is further evidence that the individuals are statutory supervisors.

Additionally, there are times when the individuals who work the disputed classifications are the highest ranking officials at the facility. Jimmy McCoy and Billy Smith have keys to the facility. They open it up in the morning before any more authoritative personnel arrive. Similarly, James Ragan remains in the facility at night even after Night Shift Superintendent Bill Jenkins has left. Jimmy McCoy and Billy Smith field telephone calls in the morning from employees who will not be able to make it in. The Employer disciplines employees if they miss work without calling in, but the evidence showed that those who call in and tell Jimmy McCoy or Billy Smith they will not be coming in are excused. The fact of employees being the highest ranking officials at the facility for short periods of time does not itself convert them to supervisors, but it is one factor of secondary indicia supporting a conclusion that the individuals are supervisors. Also, the fact that individuals in the disputed classification open the facility in the morning, field calls from employees calling in sick or otherwise unable to come to work, and lock the facility at night provides a secondary indicator that the individuals are supervisors within the meaning of Section 2(11) of the Act.

Other secondary indicators of supervisory authority militate against a conclusion that the individuals are supervisors. Thus, the supervisors are paid on an hourly basis and receive no incentive bonuses, whereas those whom the parties agree are supervisors are paid on a salary basis and participate in a bonus pool. Additionally, the individuals who work in the disputed classification perform checking, and loading duties on occasion. This fact is supportive of the Employer's argument that the individuals are "leadmen" as opposed to supervisors within the meaning of Section 2(11) of the Act. Further, management meetings take place at which only the admitted 2(11) supervisors attend.

It is true that some of the secondary indicia (hourly pay, lack of bonus program, occasional performance of manual duties, lack of attendance at management meetings) favor a conclusion that the individuals are leadmen. Other secondary indicia (highest ranking officials at the facility some of the time, the ones who open up the facility in the morning and lock it at night, the ones who field calls from employees seeking to be excused from work, the Employer's use of the term "supervisor") favor a conclusion that the individuals are supervisors. The controlling criteria are the statutory duties delineated in Section 2(11) of the Act. As mentioned above, I conclude, based on the credited evidence, that prior to October 1996, the individuals in the disputed job classifications possessed the authority to discipline employees, to assign employees, and to direct employees in their work. I further conclude that, prior to October 1996, the four individuals in dispute exercised their authority to discipline, assign, and direct through the use of independent judgment in the interest of the Employer.

## II. CHANGES IN OPERATIONS

### *A. When Bill Jenkins Became Night-Shift Superintendent, He Stripped Kermit Richey and James Ragan of their 2(11) Authorities*

The first asserted change in the Employer's operations, which it claims stripped the supervisors of their 2(11) authorities, occurred in October 1996 when Bill Jenkins became the night-shift superintendent. Bill Jenkins testified at the hearing. He was candid in his responses, and appeared to me to be truthful while he was testifying. Kermit Richey and James Ragan work on Jenkins' shift. Jenkins testified that since he started with the Employer, Richey and Ragan have not had the authority to issue discipline. (Tr. 537-538, 558.) Jenkins explained that he had a conversation with Richey and Ragan. His testimony about that conversation was as follows:

I was aware that they had some write ups because I had seen them, had done some writeups. I said you don't do that anymore, I do that. I'm a supervisor. I handle that.

Employer's Exhibit 23 corroborated Jenkins' testimony that he was the only official to administer discipline on the night shift at any time from October 1996 through August 1997. (Emp. Exh. 23.)

Kermit Richey testified that, since Jenkins has been with the Employer, Jenkins does all the cost per hundred weight calculations for the shift. (Tr. 434-435.) Since Jenkins has come to the plant, Richey spends most of his time loading and unloading trucks. (Tr. 435.) Richey's testimony was uncontroverted. I credit it for this reason and because Richey struck me as truthful while he was testifying. Formerly, Richey had been among the most zealous issuers of discipline at the facility (Emp. Exh. 23), but since he has been under Jenkins charge, Richey sticks primarily to loading and unloading trucks, and he has not issued any discipline. Richey stated that his work is basically that of a checker. (Tr. 436-437.) Richey testified that he spends only five to ten percent of his time performing paperwork. (Tr. 424.) Bill Jenkins similarly testified that manual work is most of what Richey and Ragan do. (Tr. 535.)

I conclude that when Bill Jenkins came to work for the Employer, from his former position with Tyson Foods, Jenkins changed the way things were done on the night shift. Jenkins told Richey and Ragan that they were not to issue discipline anymore. Jenkins assumed the responsibilities for calculating the cost-benefit analysis, and in fact took over most of the paperwork formerly associated with the positions held by Richey and Ragan. There are only 12 regular employees on the night shift, including those in the disputed job classifications, and Jenkins has them all working. (Tr. 544.) Richey and Ragan appear to fill in for Jenkins when he occasionally goes home for lunch or otherwise is not at the plant, and Richey also assists in paperwork if Jenkins is behind in it. But other than these differences, Richey's and Ragan's duties are not distinguishable from checkers, such as Dale Jenkins. (Tr. 437.) Thus, I find the evidence insufficient to establish that either Kermit Richey or James Ragan were supervisors within the meaning of Section 2(11) of the Act at the time of the election herein. Accordingly, I recommend that the Board conclude that Richey and Ragan were eligible voters whose ballots should be opened and counted if determinative. I recommend that the Board overrule the challenges to the ballots cast by employees Kermit E. Richey and James R. Ragan.



*B. Although the December 1996 Change in Operations Reduced the Supervisory Authority of the Day-Shift Supervisors, It Did Not Remove Them from the Definition of Section 2(11)*

Bill Jenkins' changes in the way things ran on his shift did not have any effect on the day-shift operations. The day-shift operations are substantially larger than operations on the night shift. Whereas there are only 12 or so employees on the night shift, there are more than 20 on day shift. The day-shift service employees are divided into two crews, whereas the night-shift employees are not divided by crew. (Tr. 13, 59, 105, 123, 544.) Of the two day-shift crews, one is Jimmy McCoy's crew, and the other is Billy Smith's crew.

Charles Margraf and Joe Webb both testified as to a conversation they had in December 1996 with Ron Graham, who was the Employer's regional vice-president at the time. (Tr. 295, 575.) According to Margraf and Webb, Graham informed them that the practice of hourly employees issuing discipline to other hourly employees was to stop immediately. (Tr. 296–297, 575–577.) Neither Margraf nor Webb could remember many details of the conversation. There was no written communication of the decision. (Tr. 362.) However, the testimony that Graham made these statements was uncontroverted.<sup>9</sup> Employer's Exhibit 23 corroborates the Employer's assertion that individuals in the disputed classifications did not issue any disciplines after December 1996. I conclude that the Employer did change its policy of having hourly employees discipline other hourly employees in December 1996, as Margraf and Webb testified they did. I conclude that the issuance of disciplines by hourly employees was the only change Graham directed concerning the duties of the employees in the disputed classifications.

No mention was made of changing the job title from supervisor to "leadman." The change in terminology came later, near the time of the election.<sup>10</sup> No mention was made in December 1996 about changing who computed the cost-per-hundred weight calculations, or about who would be held accountable for an unacceptable cost-per-hundred-weight ratio. Nor does the Employer assert that there were any changes in the method for assigning work, and directing work. The only change which the Employer made was in the authority of individuals in the disputed classifications to issue discipline. I find that this action did not remove the supervisors from the statutory definition.

Thus, Supervisors Jimmy McCoy and Billy Smith continued to calculate the cost-per-hundred-weight ratio. Even though they did not issue any discipline after December 1996, I am convinced that they did have authority, on behalf of the Employer to recommend discipline, and I am further convinced that these recommendations were effective. For example, Billy Smith testified that he has written up a disciplinary form for Scott Holmes for tardiness for Webb's signature and that Webb then signed the form. (Tr. 375, 398.) The Employer tried to cast the dock supervisors' duties in the most December 1996

era as merely reportorial in relation to discipline. Where an individual fills out a disciplinary form and provides it the higher level supervisor for signature, he goes well beyond reporting.<sup>11</sup>

There are approximately 18 service employees on the day shift, and their work carries them among the Employer's 35 docks and to various locations within the enormous warehouse. Without dispute, Supervisors Smith and McCoy had authority to discipline employees prior to December 1996, and Joe Webb held them accountable to provide an acceptable cost-per-hundred-weight ratio in part by disciplining those not turning out the work. (Tr. 591.)

Neither Smith nor McCoy had the ability to effect the amount of goods handled at the warehouse each day, but yet Webb required them to come in at an acceptable ratio. The only control they had was over the cost aspect of the equation. The less hours employees work to move the same amount of freight, the better the ratio. Sending employees home earlier, getting them to do their work faster, and assigning the work to employees in the most efficient manner are all ways in which Jimmy McCoy and Billy Smith control the cost ratio for which Webb holds them accountable.

I conclude that Smith and McCoy are supervisors within the meaning of Section 2(11) of the Act. Webb testified that he has in the past "gotten on" Smith and McCoy for coming in with unacceptably high cost ratios. The testimony showed that even since McCoy and Smith have ceased issuing disciplines, Billy Smith has filled out a disciplinary form, brought it to Webb, and Webb signed it. I find that very little has changed since December 1996. Although McCoy and Smith do not issue disciplines anymore, this fact has not been communicated to employees. Instead, they fill out the forms and Webb signs them. This is the epitome of effective recommendation.<sup>12</sup> Billy Smith and Jimmy McCoy continue to direct and assign the work of employees. Although direction and assignment of work does not confer supervisory authority absent the use of independent judgment in the interest of the Employer, the evidence clearly shows that McCoy and Smith were required to exercise independent judgment in performing these tasks for the sole purpose of controlling the costs for which Webb held them accountable.

The Union presented persuasive evidence that, within a few days of the election, Jimmy McCoy used his supervisory authority to deny employee Joseph David Whitten a day off that he requested. (Tr. 29.) I credit Whitten's testimony concerning a conversation he had with Jimmy McCoy around the time of August 4, 1997. Whitten recalled the event specifically, and he was certain of the date. Whitten asked to be off on August 4, 1997. It was his anniversary. McCoy denied this request. Although the Employer's counsel suggested that McCoy may

<sup>9</sup> I received the testimony concerning what Graham had told Webb and Margraf as probative of the effect the statement had on the listeners, as explanatory of the actions Webb and Margraf took, and as evidence that Graham had actually made the statement, not for the truth of any assertions contained in Graham's statement.

<sup>10</sup> I credit the testimony of witnesses Brian Abney and Roger Leath, that the Employer did not use the term "leadman" until approximately the time of the election. This testimony was corroborated by the written documents showing that the individuals persisted in signing as "supervisors" in 1997.

<sup>11</sup> The fact that Webb may have checked the numbers on Holmes' tardiness is of no help to the Employer. Merely checking to verify that someone was tardy before signing a writeup for tardiness is a clerical function and does not constitute "independent investigation."

<sup>12</sup> Although Billy Smith suggested that Ken Smith might need discipline and Webb did not issue any, this example is much different from the recommendations where Smith has, in the past, *filled out the disciplinary form and given it to Webb for him to sign*. I would not find the example helpful in any event because it happened on the day before the hearing and Webb's decision not to carry through on the suggestion may have been influenced by the value his decision not to could have at hearing the next day.

have conferred with someone else before saying no, Whitten testified that McCoy denied the request on the spot, while no one else was around. McCoy could not possibly have consulted with anyone. Whitten's testimony in this regard was uncontroverted. Although the Employer called McCoy to testify, counsel did not ask him about the recent incident where he refused to allow Whitten to leave early. In brief, the Employer contended that to the extent Jimmy McCoy exercised any supervisory authorities, it was *ultra vires*, an act outside his authority. To the contrary, I conclude that McCoy's disapproval of Whitten's requested absence was an act within his authority, consistent with the Employer's practice of having individuals in his position sign absence request forms as approving or disapproving. (E.g., U. Exhs. 14, 17.) Moreover, Webb had told employees to go to Supervisors Jimmy McCoy and Billy Smith with their problems first. (Tr. 611.) Whitten was merely following Webb's direction by going to McCoy first, and the Employer can not be heard now to claim that McCoy was acting beyond his authority. The Employer, by Joe Webb, had told employees that McCoy was the person to whom they should bring such requests. (Tr. 611.)

Unlike the night-shift personnel Richey and Ragan, the evidence showed that Smith and McCoy rarely perform manual labor. (Tr. 128-129, 180, 391.) The operations are larger and more complicated on first shift, and there are more employees on first shift, but just one superintendent. Although Joe Webb testified that he could supervise the 20 first-shift employees alone, I am convinced that not even Webb believed this statement. The assignment and direction of work of checkers, fork-lift drivers, slipsheet operators and coordination of them between the two crews, and different kinds of docks, together with the complications of the facility's limited number of blast freezers and special rules for handling the freight of particular customers is too much for Webb to handle by himself, or even with Margraf's help. The evidence showed that Webb works with the three maintenance employees on occasion and that has some interaction with customers. (Tr. 613-614.)

Unlike the night shift, where Bill Jenkins undertook of himself, before any suggestion from the regional vice-president, to handle the smaller scale operation all on his own, Webb relied on supervisors Jimmy McCoy and Billy Smith to effectuate assignment and direction of work through the use of independent judgment in the interest of the Employer. Moreover, although the regional vice-president prohibited Webb from continuing the practice of McCoy and Smith issuing discipline themselves, I am convinced that Webb continued to rely on McCoy and Smith to recommend discipline, as in the instance where Smith filled out the discipline form and gave it to Webb for Webb to sign.<sup>13</sup>

<sup>13</sup> Webb testified that along with the change in disciplining authority effectuated in December 1996, he changed his reliance on the supervisors and viewed them as having, essentially, no authority. As noted earlier, I find that the only change in operations in effectuated in December 1996 was that the individuals lost the ability to issue discipline themselves and started, instead, to effectively recommend discipline (as in the case of Scott Holmes, where Billy Smith wrote up the form and gave it to Joe Webb for Webb to sign). Implicit in this conclusion is my discrediting of Webb's assertions at various places on the record that he took over all the minutia of decision about assignments, whom to send home, etc. Joe Webb testified on the one hand that he would not have changed the supervisors' authority to discipline but for Vice President Graham's direction to do so. (Tr. 630.) On the other hand, Webb testified that he did not trust Jimmy McCoy or Billy Smith to

I conclude that there was no change in the practice of Smith and McCoy assigning and directing the work of employees through the use of independent judgment in the interest of the Employer. My conclusions regarding the pre-October 1996 assignment and direction of work are set forth in greater detail above, in section 1(A). I conclude that there was no change in the assignment and direction responsibilities of Smith and McCoy. I make this conclusion on the basis of there being no evidence that the practice ever changed. Ron Graham directed a change only in the practice of McCoy and Smith issuing discipline. The evidence demonstrated that right up until the date of the election, McCoy and Smith continued to exercise their section 2(11) authorities with respect to assigning and directing work.

Accordingly, I conclude that Jimmy McCoy and William Smith were supervisors within the meaning of Section 2(11) of the Act at the time of the election herein, and I therefore recommend that the Board sustain the challenges to the ballots they cast.

#### CONCLUSIONS AND RECOMMENDATIONS

I recommended that the challenges to the ballots cast by Jimmy W. McCoy and William J. Smith be sustained because McCoy and Smith are supervisors within the meaning of Section 2(11) of the Act.

Since the remaining three challenged ballots are not determinative of the outcome of the election, the United Steelworkers of America, AFL-CIO received a majority of the valid votes cast. Therefore, I further recommend that a Certification of Representative issue.<sup>14</sup>

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issue discipline *at all* because of the potential for favoritism(!) (Tr. 579, 618-619, 639.) Which was it? I found Webb to be an evasive witness whose testimony was gilded with an edge of self-servience. I do not credit Webb's testimony to any substantial degree. The *only* change Graham directed concerned who had the authority to issue discipline. Were it up to Webb, he would not have implemented even that change. Accordingly, I do not believe that anything else changed as a result of the conversation with Graham.

<sup>14</sup> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by December 10, 1997. Under the provisions of Sec. 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Report, are not a part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.